STATE OF MICHIGAN

COURT OF APPEALS

JAMES ADELSON, PAULA ADELSON, JAMES BAILEY, PAULINE BAILEY, JOHN CANN, THEODORE CENTER, BARBARA CENTER, NADALYNN E. CONWAY, RONALD FEIGLES, EDWYNN GLASS, PENNY GLASS, FREDERICK HINES, RICHARD JOHNSON, ANNA JOHNSON, IVA MAE LAMOREAUX, ROBERT LEADLEY, DORA LEADLEY, STEVEN LINDEMYER, MARGARET LINDEMYER, NATHAN LUPPINO, JOAN LUPPINO, MARILYN KAY NELSON, KATIE MARSH, REID MCCLELLAND, GERALDINE MCCLELLAND, MOHAMMED MOHSENIAN, F. FAHIMI, JOSEPH PALMER, RICHARD PHARO, ROBERT RANKIN, JUDITH RANKIN, JERRY RUCKER, FRANCINE RUCKER, ROBERT SHERWOOD, ROBERT WILCOX, and CATHERINE WILCOX,

Plaintiffs-Appellees,

and

CARL CIOFFI, RITA CIOFFI, JAMES HARRIS, CAROL HARRIS, KENNETH MCCLURE, and MELINDA MCCLURE,

Plaintiffs,

v

JOHN S. KARLTON and J. S. KARLTON MANAGEMENT COMPANY, INC.,

Defendants-Appellants.

UNPUBLISHED
September 26, 2000

No. 207586
Eaton Circuit Court
LC No. 91-000855-CH

JAMES ADELSON, Executor of the ESTATE OF WILLIAM J. ADELSON, Deceased, PAULA ADELSON, JAMES BAILEY, PAULINE BAILEY, JOHN CANN, THEODORE CENTER, BARBARA CENTER, NADALYNN E. CONWAY, RONALD FEIGLES, EDWYNN GLASS, PENNY GLASS, FREDERICK HINES, RICHARD JOHNSON, ANNA JOHNSON, RICHARD LAMOREAUX, IVA MAE LAMOREAUX, ROBERT LEADLEY, DORA LEADLEY, STEVEN LINDEMYER, MARGARET LINDEMYER, NATHAN LUPPINO, JOAN LUPPINO, MARILYN KAY NELSON, FRED MARSH, KATIE MARSH, REID MCCLELLAND, GERALDINE MCCLELLAND, MAHAMMAD MOHSENIAN, F. FAHIMI, JOSEPH PALMER, RICHARD PHARO, ROBERT RANKIN, JUDITH RANKIN, JERRY RUCKER, FRANCINE RUCKER, ROBERT SHERWOOD, WAYNE WETZEL, ROBERT WILCOX, and CATHERINE WILCOX

Plaintiffs-Appellants,

and

CARL CIOFFI, RITA CIOFFI, JAMES HARRIS, CAROL HARRIS, KENNETH MCCLURE, and LINDA MCCLURE,

Plaintiffs,

v

JOHN S. KARLTON and J. S. KARLTON MANAGEMENT COMPANY, INC.,

Defendants-Appellees.

No. 209577
Eaton Circuit Court
LC No. 91-000855-CH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, the parties appeal as of right from a judgment, following a jury trial, awarding plaintiffs $37,700 on their claims for breach of fiduciary duty and breach of contract against John S. Karlton, but finding no cause of action against defendant J. S. Karlton Management Company, Inc. The trial court also declined to award defendant J. S. Karlton Management Company, Inc., taxable costs as a prevailing party pursuant to MCR 2.625. We affirm.

Plaintiffs filed claims against defendants for breach of contract, negligence, breach of fiduciary duty, and unjust enrichment. This action arose out of the failure of a real estate investment partnership in which plaintiffs owned twenty limited partnership units in an apartment complex. Defendant John S. Karlton was a general partner in the investment partnership and was the sole owner of the J. S. Karlton Management Company, Inc., which managed the apartment complex. When the investment failed, the property was sold at a foreclosure sale. Plaintiffs lost their initial investment monies and incurred adverse tax consequences as a result of the forced sale. Plaintiffs generally argued that defendants had mismanaged the investment property and charged exorbitant administrative fees. However, the jury returned a no-cause verdict in the Management Company's favor. The jury found John Karlton liable to plaintiffs for breach of contract and fiduciary duty only and awarded plaintiffs $37,000, much less than the $1 million in damages they sought. The trial court awarded plaintiffs taxable costs pursuant to MCR 2.625.

Turning first to defendants' sole issue in Docket No. 207586, defendants contend the trial court erred in refusing to award the Management Company costs pursuant to MCR 2.625, on the basis the Management Company was the sole "prevailing party" in this matter. Although we agree with defendants the trial court erred in finding both plaintiffs and the Management Company to be "prevailing parties" under MCR 2.625, we do not find the trial court abused its discretion by declining to award the Management Company taxable costs under the court rule.

MCR 2.625(A)(1) provides, as pertinent, that "[c]osts will be allowed to the prevailing party in an action." Generally, this Court reviews a ruling on a motion for costs under MCR 2.625 for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996), aff'd 458 Mich 582; 581 NW2d 272 (1998). However, the determination whether a party is a "prevailing party" under MCR 2.625 is a question of law, which this Court reviews de novo. *Id.* at 521.

The trial court clearly erred in finding that both plaintiffs and the Management Company were "prevailing parties" under the court rule. MCR 2.625(B)(3) states:

> (3) Actions With Several Defendants. If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

In this action, plaintiffs filed claims against two defendants in their joint and several capacities: (1) John S. Karlton, an individual, and (2) the J. S. Karlton Management Company. The jury returned a verdict

of no cause in favor of the Management Company. MCR 2.625(B)(3) clearly provides that, in this situation, the Management Company is the prevailing party.

Regardless, the trial court was not precluded from awarding plaintiffs costs. MCR 2.625(A)(1) states in its entirety:

> (1) In General. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules *or unless the court directs otherwise, for reasons stated in writing and filed in the action.* [Emphasis added.]

Here, the trial court stated in writing its reason for awarding costs solely to plaintiff, i.e., because "a unique relationship" existed between defendants. Indeed, defendant Karlton was the sole owner and president of the J. S. Karlton Management Company. The trial court deemed it improper to award costs to the Management Company because it believed, correctly, that John Karlton, who was found liable to plaintiffs for breaches of contract and fiduciary duty, would receive the benefit of an award of costs to the Management Company. Defendants have failed to demonstrate how the trial court's decision to deny the Management Company's request for costs constituted an abuse of discretion. We affirm the trial court's decision to deny costs to the Management Company under MCR 2.625.

Next, in Docket No. 209577, plaintiffs argue they were denied a fair trial because defense counsel mentioned once in his closing argument to the jury that plaintiffs' damages award was not taxable. We disagree.

When reviewing asserted improper arguments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Id.*

Plaintiffs argue that defense counsel's isolated comment undoubtedly influenced the jury because "[p]laintiffs' clearly proven damages and the jury's grossly inadequate verdict strongly suggests that the defendants' argument had a significant prejudicial effect upon the jury." However, plaintiffs have not shown that, even if improper, counsel's comment represented a studied attempt to inflame or prejudice the jury. *Id.* Indeed, in the context of defense counsel's closing argument, it does not appear to have been. Defense counsel only made this one isolated comment. The trial court's instruction regarding the comments of counsel not constituting evidence clearly addressed the possible prejudicial effects of this isolated comment. See *Kirk v Ford Motor Co*, 147 Mich App 337, 348-349; 383 NW2d 193 (1985). We will not reverse on the basis of this comment.

Next, plaintiffs argue the trial court erred and denied them a fair trial by failing to instruct the jury that assumption of risk was not a defense to plaintiffs' lawsuit. We disagree.

On appeal, claims of instructional error are reviewed for an abuse of discretion. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 173; 568 NW2d 365 (1997). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990); *Willoughby v Lehrbass*, 150 Mich App 319, 336; 388 NW2d 688 (1986). There is no reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

Plaintiffs appear to argue that the trial court was bound to give its requested instruction on assumption of risk and its unavailability as a defense because a previous judge handling this matter had ruled that assumption of risk was not available as a defense to defendants. They appear to be making a law of the case argument. However, the law of the case doctrine applies only to issues decided by appellate courts, and provides that issues previously decided by an appellate court will not be decided differently by the same or lower courts in subsequent proceedings in the same cases where the facts remain materially the same. *Clemens v Lesnek (After Remand)*, 219 Mich App 245, 250; 556 NW2d 183 (1996). Therefore, the trial court was not bound to give plaintiffs' requested instruction.

As indicated above, jury instructions are reviewed as a whole. *Wiegerink*, *supra* at 548. This Court will not find reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock, supra* at 60. Plaintiffs have not attempted to show the jury instructions, as given, failed to achieve the goal of fair and adequate presentation. Instead, they argue, without citing any authority, the trial court's failure to give this instruction resulted in reversible error. We decline to address this issue in light of plaintiffs' failure to properly argue their position. See *Joerger*, *supra* at 178 ("A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim.").

Plaintiffs argue the trial court abused its discretion by refusing to admit two letters written by a property management expert, which plaintiffs contend established defendants' common plan or scheme to defraud investors. The letters detailed how the property manager allegedly "turned around" two of defendants' other investment properties when they were ailing financially. The trial court excluded these exhibits pursuant to MRE 404, finding they would confuse the jury from the real issues in this case. However, plaintiffs have limited their arguments to the issue whether this evidence was relevant and have utterly failed to address the trial court's main concern, that being the letters would cause undue confusion. Under these circumstances, appellate relief is not warranted. See *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (appellate relief may not be granted where a party fails to address the basis of the trial court's decision). See also *Joerger*, *supra*.

Next, plaintiffs argue the trial court abused its discretion by admitting evidence of their federal K-1 income tax returns, which defendants used to show plaintiffs had reaped substantial tax benefits from their participation in the real estate investment plan, one of the scheme's original objectives. Plaintiffs argue, based on the Supreme Court's decision in *Randall v Loftsgaarden*, 478 US 647; 106 S Ct 3143; 92 L Ed 2d 525 (1986), that the tax benefits plaintiffs derived from their investment were irrelevant to their common law claims for negligence, breach of contract, breach of fiduciary duty, and

unjust enrichment. However, *Randall* is applicable to statutory claims filed under federal securities statutes. See *id.* at 649-664. At trial, plaintiffs were very specific in noting their claims did not arise under any federal statutes. In any event, under state law, the Michigan Supreme Court has exclusive rule-making power in matters of court practice and procedure, which include the rules of evidence. *People v McDonald*, 201 Mich App 270, 272; 505 NW2d 903 (1993). Plaintiffs have failed to argue a basis for exclusion of this evidence under state law. As with plaintiffs' other improperly argued issues, we will not rationalize a basis for this allegation of error. See *Joerger*, *supra*.

Finally, plaintiffs argue the trial court abused its discretion by refusing to grant their motions for judgment notwithstanding the verdict, new trial, and additur. Once again, plaintiffs have presented this Court with an argument that is completely devoid of citation to any authority supporting their arguments and claims for relief. We will not address these issues in light of plaintiffs' utter failure to cite authority or adequately brief the three distinct issues whether the trial court abused its discretion by refusing to grant plaintiffs' motions for (1) JNOV, (2) new trial, and (3) additur. See *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 129; 463 NW2d 442 (1990) ("[W]e decline to address this issue by relying essentially on our own resources without the assistance of citation to meaningful authority or more than cursory briefing by the parties. It is not enough for the appellant to announce a position and then leave it to this Court to unravel the legal basis for the claim of error.").

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder